

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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|--------------------------|---|--------------------------------|
| UNITED STATES OF AMERICA | ) | Case No. 2:06-cr-00234-PMP-GWF |
|                          | ) |                                |
| Plaintiff,               | ) |                                |
|                          | ) |                                |
| vs.                      | ) |                                |
|                          | ) | <u>ORDER</u>                   |
| JONATHON LEON TOLIVER,   | ) |                                |
|                          | ) |                                |
| Defendant.               | ) |                                |

On December 26, 2006, on the Honorable George W. Foley, United States Magistrate Judge entered Findings & Recommendations (Doc. #51) regarding Defendant Toliver's Motion to Suppress (Doc. #33) filed October 17, 2005, in case number 2:04-cr-482-RCJ-GWF.<sup>1</sup>

Magistrate Judge Foley's recommendation (Doc. #51) provided as follows:

**"IT IS RECOMMENDED** that Defendant Jonathan Toliver's Motion to Suppress (#33) be **Granted**, in part, on the grounds that his statement on January 18, 2005 was obtained in violation of his *Miranda* rights and may not be admitted as evidence in the Government's case-in-chief. The Defendant's Motion to Suppress should also be granted as to the Defendant's January 15, 2005 statement which the Government concedes was obtained in violation of Defendant's *Miranda* rights and may not be admitted as evidence in the Government's case-in chief.

**IT IS FURTHER RECOMMENDED** that Defendant Jonathan Toliver's Motion to Suppress (#33) be **Denied** in part, on the grounds that his statement on October 7, 2004 was given during a non-custodial

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<sup>1</sup> As result of a Superceding Criminal Indictment filed in this case joining Defendant, Jonathan Leon Toliver with Defendant, Donnie Bryant, on December 13, 2006, this Court granted the stipulated dismissal of the Indictment of case number 2:04-cr-482-RCJ-(GWF), and consolidated all prior motion proceedings with this action. (See Doc. #48).

1 interview and may therefore be admitted in evidence in the  
2 Government's case-in-chief.

3 **IT IS FURTHER RECOMMENDED** that Defendant Jonathan  
4 Toliver's Motion to Suppress (#33) be **Denied** in part, on the grounds  
5 Defendant's statement on January 15, 2005 and January 18, 2005,  
6 although obtained in violation of *Miranda*, were otherwise voluntary,  
7 and therefore may be used for purposes of impeachment if Defendant  
8 testifies."

9 On January 6, 2007, Plaintiff, United States, filed objections to Magistrate Judge  
10 Foley's Report and Recommendations (Doc. #57) and on January 29, 2007, Defendant  
11 Toliver filed amended objections (Doc. #59). On March 8, 2007, the Court conducted a  
12 hearing to consider the arguments of counsel for both parties with respect to their respective  
13 objections.

14 Defendant Toliver objects to the extent that the Findings and Recommendations  
15 of Magistrate Judge Foley provide that: (1) Toliver was not in custody when he was  
16 interrogated on October 7, 2004; and (2) the "pervasive" violations of Miranda v. Arizona,  
17 384 U.S. 436 (1966) in the interrogations of Defendant, Toliver did not bar the use of  
18 Toliver's statements for impeachment at trial. (Doc. #59). The Government objects to the  
19 Findings and Recommendations of Magistrate Judge Foley concerning the legality of the  
20 *Miranda* rights provided to Toliver during his interrogation of January 18, 2005.

21 Based upon a de novo review of the proceedings, the Court finds that the  
22 Government's objection to Magistrate Judge Foley's finding that the statement of Toliver  
23 given on January 18, 2005, were obtained in violation of *Miranda* must be overruled and  
24 Magistrate Judge Foley's Findings and Recommendations Affirmed.

25 Similarly, based upon a de novo review of the proceedings, the Court also finds  
26 that Defendant Toliver's objection to Magistrate Judge Foley's findings that although  
27 Defendant Toliver's statements of January 15, 2005 and January 18, 2005, were obtained  
28 in violation of *Miranda*, they were otherwise voluntary and thus may be used for purposes  
29 of impeachment must be overruled and the Findings and Recommendations of Magistrate

1 Judge Foley in this regard must be Affirmed.

2 The Court's de novo review of Toliver's objection to Magistrate Judge Foley's  
3 finding that Toliver was not in custody when he was interrogated on October 7, 2004,  
4 however, leads to a different result.

5 The Court concurs with Magistrate Judge Foley's declaration of the legal  
6 standard to be applied in assessing whether an individual is "in custody" during an  
7 interrogation, to wit: what were the circumstances surrounding the interrogation, and given  
8 those circumstances, would a reasonable person have felt at liberty to terminate the  
9 interview and leave. Thompson v. Keohane, 516 U.S. 99, 113 (1995). The following  
10 factors, however, cause this Court to conclude that under the Thompson v. Keohane,  
11 standard, Toliver must be deemed to have been in custody at the time of his interrogation on  
12 October 7, 2004.

13 1. Toliver was in the process of being released from the  
14 Stewart-Mohave Jail when Detectives Bodnar and Tanner approached  
15 him and asked if he would go with them to the North Las Vegas Police  
16 Department for questioning regarding some shootings. Toliver agreed.

17 2. The Detectives told Toliver, "once we are done" they would take Toliver  
18 home. Toliver's home was a considerable distance from the police department  
19 building.

20 3. Upon arrival at the police department, the Detectives drove their  
21 vehicle into a parking lot secured by a fence and automatically locked  
22 gate. Once inside the police department building, the detectives led  
23 Toliver through two secure doors and into an interrogation room.

24 4. Toliver brought a bag of personal belongings into the building,  
25 including a cell phone, money, keys and some jewelry but the  
26 detectives took Toliver's property and put it into an office.

5. After the detectives placed Toliver into an interrogation room, they  
closed the door and left him there alone for approximately 40-45  
minutes. The room was windowless and contained only a table and  
chairs. A video camera hung in the corner.

6. Detective Bodnar commenced the interrogation with a defective  
recitation of the Miranda warnings.

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1 7. At no time during the two-hour interrogation did Detective Bodnar  
2 tell Toliver that he was free to leave.

3 8. Detective Bodnar presented Toliver with other witnesses'  
4 statements relating to Toliver's participation in various crimes. Bodnar  
5 challenged Toliver's answers to questions regarding the shooting incidents saying  
6 things like:

7 "that's not adding up"

8 "dude I need you to be straight with me and don't bull shit me"

9 "Are you sure, tell me the truth, dude"

10 "your story is way different from Chuck's, because Chuck told us what  
11 happened"

12 "Now's the time to clear all this shit up"

13 "Okay let me stop you because I don't want no more bull shit on this okay?"

14 9. Detective Bodnar also queried Toliver repeatedly concerning the  
15 type of gun he used, where he was positioned, who participated, what  
16 prompted the defendants to shoot at the victim, and how many shots  
17 Toliver fired.

18 10. The focus of the interview was on Toliver's involvement in  
19 multiple shooting incidents

20 11. Toliver had no means of transportation and depended on the  
21 officers to take him home

22 Although the Court recognizes that Toliver had been told that he was not under  
23 arrest and was not handcuffed at the time of the interrogation, the Court finds that the  
24 foregoing factors would cause a reasonable person to feel that they were not at liberty to  
25 terminate the interrogation and leave.

26 IT IS THEREFORE ORDERED that the objections of the Government  
(Doc. #57) filed January 26, 2007, are Overruled.

IT IS FURTHER ORDERED that the amended objections to Findings and  
Recommendations regarding Motion to Suppress (Doc. # 59) filed January 29, 2007, on  
behalf of Defendant, Jonathan Toliver are Overruled in part and Sustained in part.

IT IS FURTHER ORDERED that the Findings and Recommendations (Doc.  
#51) entered by the Honorable George W. Foley, United States Magistrate Judge on  
December 27, 2006, are hereby affirmed with the exception of the recommendation that  
Defendant Toliver's Motion to Suppress (Doc. #33) be denied in part, on the grounds its

1 statement of October 7, 2004, was given during a non custodial interview and may therefore  
2 be admitted in evidence in the Government's case-in-chief, which Findings and  
3 Recommendations is Overruled.

4 IT IS FURTHER ORDERED that Defendant Jonathan Toliver's Motion to  
5 Suppress (Doc. #33) filed October 17, 2005, is therefore Granted, except to the extent that  
6 Defendant's statement on January 15, 2005 and January 18, 2005, although obtained in  
7 violation of *Miranda*, were otherwise voluntary and may therefore be used for purposes of  
8 impeachment if Defendant testifies at trial.

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10 DATED: March 27, 2007.

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12 PHILIP M. PRO  
13 United States District Judge  
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